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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

In re FACEBOOK BIOMETRIC  
INFORMATION PRIVACY LITIGATION

) Master File No. 3:15-cv-03747-JD

) CLASS ACTION

) This Document Relates To:

) ALL ACTIONS.

) PLAINTIFFS' OPPOSITION TO  
) FACEBOOK, INC.'S MOTION FOR  
) SUMMARY JUDGMENT

) DATE: May 3, 2018  
) TIME: 10:00 a.m.  
) CTRM: 11, 19th Floor  
) JUDGE: Hon. James Donato

[REDACTED]

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1 **I. INTRODUCTION<sup>1</sup>**

2 Facebook collects and stores biometric data from users in Illinois without their prior  
3 informed written consent in violation of the Illinois Biometric Information Privacy Act, 740 ILCS  
4 14/1 *et seq.* (“BIPA”).

5 Facebook’s motion for summary judgment (ECF No. 299) (“Motion” or “Mot.”), its fourth  
6 dispositive motion, hardly attempts to point to an absence of a genuine issue of material fact as  
7 required by Federal Rule of Civil Procedure 56(a). As this court has recognized, “a principle  
8 purpose of summary judgment ‘is to isolate and dispose of factually unsupported claims,’” not  
9 already decided issues of law. *Brickman v. Fitbit, Inc.*, 2017 U.S. Dist. LEXIS 202568, at \*4 (N.D.  
10 Cal. Dec. 8, 2017) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)).<sup>2</sup> Instead of  
11 directly addressing the facts at issue, Facebook again argues that notwithstanding the Supreme  
12 Court’s ruling in *Spokeo, Inc. v. Robins*, \_U.S.\_, 136 S. Ct. 1540 (2016), and this Court’s February  
13 26, 2018 ruling on defendant’s renewed motion to dismiss (ECF No. 294) (“Renewed MTD Order”),  
14 plaintiffs have not been aggrieved by Facebook’s violations of BIPA. Mot. at 9-14.

15 Facebook further claims, in what amounts to a motion for reconsideration filed two years  
16 late, that this Court got it wrong in May 2016 when it rejected Facebook’s argument that BIPA  
17 excludes photographs from its definition of biometric identifiers. Mot. at 24. Failing  
18 reconsideration, the Motion is a prayer for forgiveness. Despite being directly warned in 2012 by  
19 the United States Senate Committee on the Judiciary (“Senate Judiciary Committee”) that it was  
20 likely violating BIPA, Facebook argues that it should be excused because its army of lawyers and  
21 lobbyists just did not quite understand the law. Mot. at 18. Facebook asks the Court to essentially  
22 rewrite the BIPA damages provision to limit plaintiffs’ recovery to *one* violation as opposed to  
23 recovery for “*each*” violation, as clearly stated in the statute, and require plaintiffs to show  
24 Facebook’s violation was “willful,” as opposed to the law’s actual requirement of negligence, to  
25 recover the \$1000 statutory minimum damages. Mot. at 18, 25. The Court should reject Facebook’s

26 <sup>1</sup> Defendant is Facebook, Inc. (“Facebook” or the “Company”). Plaintiffs are Adam Pezen  
27 (“Pezen”), Nimesh Patel (“Patel”), and Carlo Licata (“Licata”).

28 <sup>2</sup> All citations and footnotes omitted and emphasis is added unless otherwise indicated.

1 serial attempts to undo prior rulings, rewrite BIPA and essentially get a free pass based on its  
2 supposed ignorance.

3 Facebook's fact contentions concerning the *merits* of the case, relegated to the final few  
4 pages of its Motion, are unpersuasive and seriously undermined by the overwhelming evidence to  
5 the contrary, including Facebook's founder and Chief Executive Officer ("CEO") Mark  
6 Zuckerberg's ("Zuckerberg") admission just days ago that Facebook *does not* currently obtain prior  
7 affirmative consent from its users before collecting biometric data and the Company's admission that  
8 it collects users' "biometric data," but does not publicly use that term because it [REDACTED]  
9 Ex. 1 at FBBIPA\_00009284.<sup>3</sup>

10 Facebook has utterly failed to carry its burden on summary judgment. In light of plaintiffs'  
11 identification of probative evidence going to every element of their claims, as well as this Court's  
12 recent acknowledgment that the parties, at a minimum, dispute the facts related to whether Facebook  
13 complied with BIPA's notice and consent provisions, Facebook's Motion must be denied.

## 14 **II. ARGUMENT**

### 15 **A. Standard of Law**

16 Summary judgment is proper where there is no genuine issue as to any material fact and the  
17 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at  
18 324. The moving party bears the initial burden of demonstrating that no genuine issue of material  
19 fact exists. *Celotex*, 477 U.S. at 323. A genuine issue of material fact exists if, and only if, the  
20 evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party  
21 opposing the motion. Once a party has met its burden, the non-moving party must then present some  
22 significant, probative evidence indicating that a genuine issue of material fact exists as to each  
23 element of its claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986). A mere scintilla  
24 of evidence is not enough. *Id.* at 252. The Court must view the evidence in a light most favorable to  
25 the non-moving party. *Id.* at 255.

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27 <sup>3</sup> All "Ex. \_" references herein are to the Declaration of Shawn A. Williams in Support of  
28 Plaintiffs' Opposition to Facebook, Inc.'s Motion for Summary Judgment, filed concurrently  
herewith, unless otherwise indicated.

1           **B.       Facebook Fails to Demonstrate the Absence of Genuine Issues of**  
2           **Material Fact Related to Whether Plaintiffs Were Aggrieved by**  
3           **Facebook’s Violation of BIPA**

4           Although Facebook recognizes that plaintiffs allege an invasion of privacy (*see* Mot. at 12), it  
5 insists that plaintiffs were not “aggrieved” under BIPA because an invasion of privacy is  
6 “insufficient for liability . . . absent proof that the invasion . . . resulted in an ‘actual injury, adverse  
7 effect, or harm.’” Mot. at 12. This Court has already flatly rejected Facebook’s assertion, which  
8 relies on *Rosenbach v. Six Flags Entm’t Corp.*, 2017 IL App (2d) 170317, ¶20 n.1 (Dec. 21, 2017) –  
9 a currently unpublished opinion by an intermediate court of appeals in Illinois. April 16, 2018 Order  
10 re Class Certification (ECF No. 333) (“Class Cert. Order”) at 8-12; *see also* Renewed MTD Order at  
11 6 (there is “little question that [through BIPA,] the Illinois legislature codified a right of privacy in  
12 personal biometric information”). The critical difference in *Rosenbach*, as this Court noted, is that  
13 unlike here, the plaintiff in *Rosenbach* **did not** allege that she (or her minor son who had his  
14 biometric data collected) “‘suffered any actual injury.’” Class Cert. Order at 9. Rather, only a  
15 “technical violation” of BIPA’s notice and consent requirements was alleged. *Id.* “As the Court has  
16 already found, there is no question that plaintiffs here have sufficiently alleged that intangible  
17 injury.” *Id.* at 9-10. And “a fair reading suggests that the *Rosenbach* court would have reached the  
18 opposite conclusion had the allegations in this case been before it.” *Id.* at 9. These distinguishing  
19 facts alone are sufficient to overcome Facebook’s reliance on *Rosenbach*, but this Court has noted in  
20 a well-reasoned analysis: “[t]o the extent *Rosenbach* might be read differently, the Court would part  
company with it” (as well as the Illinois trial court opinion that relies on it). *Id.* at 10, 12.

21           **C.       Facebook Did Not Obtain Informed Prior Written Consent to Collect**  
22           **Biometric Data as Required by BIPA**

23           BIPA requires private entities that collect biometric data to comply with strict notice and  
24 affirmative consent provisions. BIPA is very clear on the type of affirmative consent it requires:  
25 **prior “informed written consent.”** 740 ILCS 14/10, 14/15(b)(3). There is no dispute that  
26 Facebook’s facial recognition technology used to power its “Tag Suggestions” tool is activated for  
27 all users by default. *See* Ex. 3 at FBBIPA\_00009320 [REDACTED]  
28 [REDACTED]. That means that from the moment Facebook rolled out Tag Suggestions in January 2011 (*see*



1 Sherman Decl., ¶(6),<sup>4</sup> Facebook was automatically collecting biometric data from every uploaded  
2 photo. Users, therefore, did not even have the *opportunity* to provide consent, much less to provide  
3 Facebook with the informed written consent that BIPA requires.<sup>5</sup>

4 While this Court has already recognized that the parties “contest the facts surrounding notice  
5 and consent” (Renewed MTD Order at 9), the April 10, 2018 Congressional testimony of Facebook  
6 founder and CEO Zuckerberg, should put this issue to rest. In response to questioning from  
7 Washington Senator Maria Cantwell, Zuckerberg conceded that Facebook *does not* obtain users’  
8 “affirmative consent” for its use of facial recognition technology, but that the Company will now “go  
9 forward and implement” the “affirmative consent and the special controls around sensitive types of  
10 technology, like face recognition, that are required in [Europe].” Ex. 4 at 15.

11 The European regulatory prohibitions surrounding privacy and affirmative consent are well  
12 known to Facebook. In 2012, German and European privacy regulations forced Facebook to  
13 deactivate its facial recognition technology for all users in the European Union (“EU”). Ex. 6. A  
14 press release announcing the administrative order by the Hamburg Commission for Data Protection  
15 and Freedom of Information stated that the order obliged Facebook to “make sure[] that biometric  
16 profiles of its . . . users will only be created and stored with their *active consent*.” *Id.* The press  
17 release stressed that it was “not the aim of this decision to prevent the use of this technology, but to  
18 give tools to the users which *enables them to a conscious and active decision* whether or not to  
19 participate in this technology.” *Id.* Rather than comply with the “active consent” requirements in  
20 the EU, Facebook elected to simply deactivate Tag Suggestions for the continent while continuing to  
21 collect biometric data in the U.S. without “active consent,” in violation of BIPA. Ex. 7; Ex. 8 at  
22 FBBIPA\_00008128.

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24  
25 <sup>4</sup> Declaration of Robert Sherman in Support of Facebook, Inc.’s Motion for Summary Judgment  
(ECF No. 299-21) (“Sherman Decl.”).

26 <sup>5</sup> On April 6, 2018, over a dozen consumer and privacy groups in the United States filed a  
27 Complaint, Request for Investigation, Injunction, and Other Relief with the United States Federal  
28 Trade Commission accusing Facebook of deceptively rolling out expanded uses of facial recognition  
technology without obtaining their explicit “opt-in” consent. *See* Ex. 5.

1 Here in the U.S., Facebook continues to collect users' biometric identifiers without obtaining  
2 affirmative consent. Just last week, *Wired Magazine* published an article titled "As Zuckerberg  
3 Smiles to Congress, Facebook Fights State Privacy Laws," reporting that lobbyists funded by  
4 Facebook have submitted proposed amendments to BIPA which would gut the statute and allow  
5 Facebook to continue its undisclosed collection of biometric data with impunity:

6 **Weakening a Biometrics Law in Illinois**

7 While Zuckerberg answered questions from Congress Wednesday, state  
8 representatives in Illinois were scheduled to attend the first of two hearings about a  
9 proposed amendment to the Biometric Information Privacy Act . . . .

10 The proposed amendment . . . if passed . . . would essentially gut the law,  
11 which is widely regarded as one of the strongest biometric privacy protections in the  
12 country. . . .

13 Passed in 2008, the Illinois *law requires that companies ask permission*  
14 *before collecting biometric data, including for facial recognition.* It mandates  
15 corporations list the purpose and length of time a person's data will be stored, and to  
16 include those details in a written biometric privacy policy.

17 \* \* \*

18 Two sponsors of the legislation in the Illinois Senate – Napoleon Harris, and  
19 Chris Nybo *each received contributions of \$2,000 to \$2,500 from Facebook* late last  
20 year . . . . The amendment is also supported by the Illinois Chamber of Commerce's  
21 Tech Council, of which Facebook is a member.<sup>6</sup>

22 Ex. 11 at 2-3.

23 Facebook has never seriously claimed (because it cannot) that it complies with BIPA's strict  
24 notice and affirmative consent requirements and it has not pointed to any evidence that it does.<sup>7</sup>  
25 Instead, Facebook's position is that "every person who signs up for Facebook accepts terms of  
26 service and thereby consents" to the collection of biometric data and that continued use of Facebook  
27 after being put on notice equates to prior informed written consent. See ECF No. 169 ("Amended  
28 Answer") at 22. And in its Motion, Facebook asserts that it satisfied the "purpose" of BIPA by

25 <sup>6</sup> In 2016, after this Court's May 5, 2016 Order (*In re Facebook Biometric Info. Privacy Litig.*, 185  
26 F. Supp. 3d 1155 (N.D. Cal. 2016) ("*MTD Order*"), similar efforts were made to change the  
27 language of BIPA which, had they been successful, would have quieted BIPA. See Ex. 9; Ex. 10.

28 <sup>7</sup> During the April 10, 2018 Senate hearing, Illinois Senator Dick Durbin expressed  
disappointment that Facebook was still opposing BIPA and asked Zuckerberg to explain how  
Facebook was complying. Zuckerberg did not provide an answer during his testimony. Ex. 4 at 26.

1 providing plaintiffs with “adequate notice” and obtaining their “legal consent.” Mot. at 12-13. Each  
2 of these contentions is devoid of legal support and should be rejected.

3 **1. Facebook Failed to Obtain Any Consent that Was *Informed***

4 BIPA requires private entities collecting biometric identifiers to “inform[] the subject . . . in  
5 writing that a biometric identifier . . . is being collected or stored.” 740 ILCS 14/15(b)(1). Facebook  
6 relies on its user agreement and its Data Policy<sup>8</sup> which it asserts “informed [plaintiffs] about the  
7 precise data collection at issue here.” Mot. at 14. This assertion is belied by Facebook’s denials that  
8 it collects or stores biometric identifiers in the first place.<sup>9</sup> Neither the user agreement nor the Data  
9 Policy informs users about Facebook’s biometric data collection practices because nowhere in the  
10 Data Policy (or the user agreement) does Facebook mention the words “biometric identifier,”  
11 “biometric data,” “face scan,” “facial recognition,” or any other term that would even hint to users  
12 that their biometric data are being collected. We know now that Facebook’s omission of such terms  
13 is concededly intentional as the Company and software developers knew early on that the term  
14 “biometric data” “tends to scare people off.” Ex. 1 at FBBIPA\_00009284. Facebook actually  
15 admits that in order to obscure the fact that it collects biometric data, Facebook tells users “we use  
16 existing photos of people to aid us with search in new photos,” or it uses some other vague  
17 terminology to refer to its practices. *Id.*

18 An examination of the Data Policies and user agreements in place during the relevant period  
19 illustrate the vagueness of the language in those documents consistent with Facebook’s policy of  
20 intentionally avoiding use of the term biometric data. For example, the Data Policy purportedly in  
21 place on October 5, 2010, stated only that [REDACTED]

22 [REDACTED]  
23 [REDACTED] Sherman Decl., Ex. 2 at FBBIPA\_00000927. The Data Policy  
24 purportedly in effect on September 7, 2011, stated only that [REDACTED]

25 [REDACTED]  
26 <sup>8</sup> Also referred to as “Privacy Policy” or “Data Use Policy.”

27 <sup>9</sup> Indeed, it defies logic and reason for Facebook to deny it collects biometric identifiers while at  
28 the same time maintaining it somehow discloses that it collects biometric identifiers.

1 [REDACTED]  
2 Sherman Decl., Ex. 3 at FBBIPA\_00000865. The data policies that were purportedly in effect on  
3 June 8, 2012 and November 15, 2013, use similar language. See Sherman Decl., Exs. 4-5.<sup>10</sup> The  
4 Data Policy purportedly in place as of September 29, 2016, merely states that [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 Mot. at 13 (quoting Sherman Decl., Ex. 6 at FBBIPA\_00044563).

8 The truth is that no user could reasonably glean from Facebook’s deliberately vague  
9 references to [REDACTED] “information we receive  
10 about you,” and “information about you that we collect from other Facebook users” that Facebook  
11 routinely collects, stores, and uses their biometric data (which is precisely what Facebook intended  
12 in order to avoid [REDACTED]). In fact, six years ago, during a 2012 hearing before the  
13 Senate Judiciary Committee, former Senator Al Franken took issue with Facebook’s lack of  
14 transparency and questioned how a user could possibly make an informed decision if Facebook does  
15 not actually tell them that it uses facial recognition:

16 Nowhere on this screen or on the screen that you get when you click “Learn More,”  
17 do you see the words “facial recognition” or anything that describes facial  
18 recognition. . . . ***How can users make an informed decision about facial recognition  
in their privacy settings if you do not actually tell them in their privacy settings you  
are using facial recognition?***

19 Ex. 12 at 27.

20 And just last week, on April 10, 2018, during Zuckerberg’s Congressional testimony, Louisiana  
21 Senator John Kennedy exclaimed to Zuckerberg it was clear that Facebook’s user agreement was not  
22 designed to inform users rather, it appeared designed to “cover Facebook’s rear end”:

23 [KENNEDY] ***Here’s what everybody’s been trying to tell you today***, and –  
24 and I say this gently. ***Your user agreement sucks.***

25 \* \* \*

26 <sup>10</sup> Unlike the current Data Policy, however, the prior versions that pre-date this litigation stated that  
27 Facebook is able to suggest tags by “scanning” user’s pictures. In a transparent but futile effort to  
28 remove its practices from the reach of BIPA, Facebook removed its reference to “scanning” pictures  
from the current Data Policy. Sherman Decl., Ex. 6. See also Ex. 37 (Facebook’s Proposed Data  
Policy as of April 5, 2018).

1       ***The purpose of that user agreement is to cover Facebook’s rear end. It’s not to***  
2       ***inform your users about their rights.***

3       Ex. 4 at 63.

4       The only time Facebook has used the term ***facial recognition*** to refer to its practices was  
5       purportedly somewhere in its “Help Center.” Sherman Decl., ¶16. But as Senator Franken noted,  
6       this page is buried deep within Facebook’s website and requires users “to go through six different  
7       screens to get there.” Ex. 12 at 27. Facebook contends that [REDACTED]  
8       [REDACTED]. Mot. at 8 (citing Sherman  
9       Decl., ¶6 & Ex. 1 at FBBIPA\_00001123). But there is no evidence that the language in this “Note”  
10      – or in the Help Center for that matter – was sent directly to any user in Illinois or was made part of  
11      the user agreement or Data Policy. In fact, Facebook concedes that the “Facebook and Privacy”  
12      page where the Note was purportedly published, has approximately 2.65 million total followers on  
13      Facebook, as compared to the ***7 million*** users in Illinois as of 2015. Sherman Decl., ¶7. More  
14      importantly, nothing in the Note mentions collection or storage of biometric data. *Id.* Ultimately,  
15      there is no evidence that Illinois residents were ever informed of Facebook’s use of “facial  
16      recognition,” let alone the collection of their biometric data.<sup>11</sup> Facebook admits that it only recently  
17      – “[o]n about December 17, 2017” – started ***directly*** notifying users that it uses “facial recognition.”  
18      Sherman Decl., ¶14 & Ex. 7.

19      In addition to failing to inform users that their biometric data were being collected, Facebook  
20      also failed to satisfy BIPA’s requirement that it “inform[] the subject . . . in writing of the specific  
21      purpose and length of term for which a biometric identifier . . . is being collected, stored, and used.”  
22      740 ILCS 14/15(b)(2). As Facebook notes, its only disclosure on this point is in the Data Policy,  
23      which states that [REDACTED]

24      <sup>11</sup> Facebook asserts that plaintiff Licata “admitted” that Facebook’s use of facial recognition was  
25      “evident” from the Data Policy. But knowledge of “facial recognition” does not establish  
26      knowledge of Facebook’s collection of biometric data. Moreover, Facebook concedes that Licata  
27      testified that Facebook should make it ***very evident*** that this is taking place.” Mot. at 13. Facebook  
28      also asserts, without citing any testimony, that “[n]either Mr. Pezen nor Mr. Patel has ever said  
    otherwise” (*id.*), which is nonsensical. This entire case is based on Facebook’s failure to adequately  
    disclose its biometric data collection practices and Facebook need look no further than the  
    Consolidated Class Action Complaint (ECF No. 40) (“Complaint”) in this action to see where Pezen  
    and Patel have said so.

1 [REDACTED]  
2 [REDACTED] Mot. at 13 (quoting Sherman Decl.,  
3 Ex. 6 at FBBIPA\_00044565). This language is insufficient for two reasons. First, because  
4 Facebook fails to inform users that their biometric data is being collected, users cannot know that the  
5 retention and destruction schedule, referencing “data” generally, applies to biometric identifiers.  
6 Second, the evidence shows that Facebook’s Data Policy did not even included this language prior to  
7 June 8, 2012. *Compare* Sherman Decl., Ex. 4 *with* Sherman Decl., Exs. 2-3. So even if this  
8 language was sufficient to satisfy BIPA (which it is not), the evidence indisputably shows that  
9 Facebook made zero effort to comply with BIPA’s notice provisions prior to June 8, 2012.

10 The evidence establishes that Facebook deliberately obscures the fact that it collects  
11 biometric data, users are not informed about Facebook’s practices, and are, thus, incapable of  
12 providing Facebook with the *informed* consent BIPA requires. *See, e.g., Benson v. Terhune*, 304  
13 F.3d 874, 883 (9th Cir. 2002) (informed or knowing consent requires “a full awareness of both the  
14 nature of the right being abandoned”).

## 15 2. Facebook Failed to Obtain Any Consent that Was Written

16 Facebook also failed to obtain any consent that was *written*, as required by BIPA. And  
17 Facebook does not contend otherwise. Rather, relying on this Court’s prior ruling that  
18 “individualized notice in combination with a user’s continued use is enough for notice and assent” to  
19 Facebook’s choice-of-law provisions, Facebook asserts that each plaintiff gave “*legal assent*” to the  
20 Data Policy. Mot. at 13-14 (citing *MTD Order*, 185 F. Supp. 3d at 1166-67). As this Court noted, a  
21 contract may be formed where “the offeror ‘provide[s] *reasonable notice*’ of the proposed terms”  
22 but here, while Facebook may have provided plaintiffs with “reasonable notice” of the choice-of-law  
23 and venue terms, it provides users with *no notice* that it collects, uses, and stores their biometric  
24 identifiers (a term, again, Facebook specifically and admittedly avoids using).<sup>12</sup> *See supra* §II.C.

25  
26  
27 <sup>12</sup> Moreover, under principles of contract law, the Data Policy would constitute a “browsewrap”  
28 agreement, which as this Court noted, “have been viewed with skepticism.” *MTD Order*, 185 F.  
Supp. 3d at 1164-65.

1 The Court's *MTD Order* ruling related to Facebook's "*user agreement*" last revised on  
2 January 30, 2015, *not its Data Policy*, which is where Facebook claims to disclose its facial  
3 recognition practices. The Court based its ruling on evidence that Facebook provided *direct notice*  
4 to users by email that the terms of the user agreement were changing, and that Facebook users would  
5 also receive a "jewel notification" on their newsfeed regarding the change in terms. *MTD Order*,  
6 185 F. Supp. 3d at 1167. Here, there is no evidence that Facebook provided users with the same  
7 direct BIPA-required notice or jewel notifications when it made changes to the Data Policy.

8 Furthermore, even under Facebook's meritless theory that plaintiffs gave "legal assent" to the  
9 Data Policy as of January 30, 2015, there is no evidence that Facebook waited for plaintiffs to  
10 manifest their assent to the Data Policy by continuing to use Facebook before Facebook collected  
11 their biometric identifiers. Facebook asserts that plaintiffs "had all of the information they needed to  
12 exercise their "power to say no," by opting out of Tag Suggestions (Mot. at 13), but in reality,  
13 plaintiffs' only power (assuming they were aware of Facebook's default settings) was to say "stop,"  
14 after the fact, to end Facebook's unauthorized collection of their biometric identifiers. Such power  
15 to say "stop" does not comply with BIPA's express requirement of *prior* consent. At bottom, there  
16 is no evidence that Facebook obtained written consent from plaintiffs as required by BIPA, and even  
17 if legal assent were sufficient (it is not), there is no evidence that Facebook ever obtained legal  
18 assent to the Data Policy, and certainly not before January 30, 2015.<sup>13</sup>

19 **D. Facebook Fails to Identify the Absence of a Genuine Issue of Fact**  
20 **Concerning Plaintiffs' Recovery of Damages Under BIPA**

21 For each violation of BIPA, a prevailing party is entitled to recover: "(1) against a private  
22 entity that negligently violates a provision of [BIPA], liquidated damages of \$1,000, or actual  
23 damages, whichever is greater; (2) against a private entity that intentionally or recklessly violates a  
24

---

25 <sup>13</sup> From the moment Facebook rolled out Tag Suggestions in January 2011 (*see* Sherman Decl.,  
26 ¶6), Facebook was automatically collecting biometric data from every uploaded photo. But  
27 according to Facebook's own exhibits, the [REDACTED] *See* Sherman Decl., ¶12 & Ex. 4 (FBBIPA\_00000870 at  
28 75). That means that Facebook collected users' biometric data, at a minimum, for over a year before  
Facebook even produced a policy (albeit a vague and insufficient one), it claims users consented to.

1 provision of [BIPA], liquidated damages of \$5,000 or actual damages, whichever is greater.” 740  
2 ILCS 14/20.

3 Facebook makes several arguments suggesting that even if plaintiffs prevail, they cannot  
4 prove that they are entitled to any recovery of damages under BIPA. *See* Mot. at 14-18. None of  
5 those arguments identify the absence of a genuine issue of fact. And each have little, if any, support  
6 in fact or the law. First, Facebook makes an untimely request for reconsideration of this Court’s  
7 *MTD Order* that photographs are not excluded from BIPA’s definition of “biometric identifier.”  
8 Mot. at 24. But Facebook does not even attempt to comply with the procedural requirements of  
9 Civil Local Rule (“L.R.”) 7-9 and does not even try to meet any of the legal standards, *e.g.*,  
10 identification of manifest error of law or fact or the emergence of new facts or binding authority.  
11 L.R. 7-9. Facebook also requests that the Court find, as a matter of law, that plaintiffs cannot  
12 recover damages because Facebook’s violations of BIPA, which were concededly not accidental, are  
13 excused because Facebook simply didn’t understand the law. Mot. at 15-18. Apart from identifying  
14 no facts supporting this newly unpled defense, Facebook asks the Court to rewrite the BIPA  
15 damages provision to replace “negligently violates” with “willfully violates” and then find as a  
16 matter of law that Facebook was not willful or reckless in misinterpreting BIPA. Mot. at 14-25.

17 Finally, Facebook contends that regardless of how many BIPA violations it committed  
18 against any individual Facebook user, plaintiffs’ recovery of damages should be limited to a single  
19 violation per person, despite the plain language of the statute which permits a prevailing party to  
20 recover for “each” violation. Mot. at 25.<sup>14</sup> None of these arguments have merit.

21 **1. Facebook’s Belated Request to Reconsider the *MTD Order***  
22 **Violates the Procedure and Substance of L.R. 7-9**

23 On May 5, 2016, this Court found, contrary to Facebook’s interpretation, BIPA’s definition  
24 of “biometric identifier” does not exclude biometric data or scans of face geometry collected from  
25 photographs. *MTD Order*, 185 F. Supp. 3d at 1171-72 (“to read that categorical exclusion into the  
26 statute would substantially undercut it because the scanning of biometric identifiers is often based on

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27 <sup>14</sup> Recognizing it has no credible defense, Facebook has once again resorted to new lobbying  
28 efforts to change the statute to conform with its business interest. Ex. 13; Ex. 11.



1 an image or photograph” and run contrary to the purpose of protecting privacy in the face of  
2 emerging biometric technology). The Court ultimately found plaintiffs’ allegations that Facebook’s  
3 facial recognition technology involves a scan of face geometry sufficient to adequately allege  
4 violations of BIPA. *Id.*

5 Facebook’s request for reconsideration fails for multiple reasons, not the least of which is its  
6 failure to follow the procedural and substance of L.R. 7-9.<sup>15</sup> The Court may deny Facebook’s  
7 request on that basis alone. *Jackson v. Bright*, 2015 U.S. Dist. LEXIS 38809, at \*13 (N.D. Cal. Mar.  
8 26, 2015) (citing *Tri-Valley CAREs v. U.S. Dept. of Energy*, 671 F.3d 1113, 1131 (9th Cir. 2012)).  
9 Facebook does not identify any change in material fact or law since the *MTD Order* and no manifest  
10 error of the Court to consider material facts or dispositive legal arguments. Nor does Facebook  
11 establish that it was diligent in seeking reconsideration as the request comes **22 months after** the  
12 *MTD Order*. See L.R. 7-9(b).

13 Facebook takes issue with the Court’s ruling that BIPA’s definition of biometric identifiers is  
14 better understood to mean “paper photographs” and “not digitized images stored as a computer file  
15 and uploaded to [Facebook].” *MTD Order*, 185 F. Supp. 3d at 1171. Facebook argues that it is  
16 “undisputed . . . that many photos uploaded to Facebook are derived from paper prints.” Mot. at 17.  
17 But it cites *no* evidence (much less undisputed evidence) that many photos uploaded to Facebook are  
18 derived from paper prints. Moreover, there is simply no meaningful distinction between the Court’s  
19 *MTD Order* reasoning and the testimony of Facebook’s key witness Yaniv Taigman (“Taigman”)  
20 who explains that paper photographs must be converted to digital photographs before being  
21 uploaded. See Ex. 14 at 134 (describing performance of facial recognition on paper photographs  
22 **converted to jpegs** or **digitized** stored on a computer and uploaded to Facebook); see also Ex. 15 at  
23 123. The evidence proffered by Facebook agrees with the Court’s analysis and is contrary to the  
24 basis of its current request for relief.

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25 <sup>15</sup> L.R. 7-9(b) provides that a party moving for reconsideration of an interlocutory order must first  
26 seek leave to file such a motion **and** show: (1) that there has been a change in material fact or law  
27 from that which was presented to the Court before the entry of the order; (2) the emergence of new  
28 material facts or a change of law occurring after the order; or (3) a manifest failure by the Court to  
consider material facts or dispositive legal arguments that were presented to the Court before such  
order. *Id.*

1                                   **2.       Mistake of Law Is Not a Defense and Facebook Could Not**  
2                                   **Establish Such a Mistake if It Were**

3           The facts undisputedly establish that Facebook intentionally collects biometric identifiers  
4 from Illinois residents in order to drive its facial recognition technology and its Tag Suggestion  
5 feature. *See* Ex. 16. Facebook claims that even though its conduct is not accidental, it mistakenly  
6 interpreted BIPA to exclude photographs from its definition of biometric identifiers and that mistake  
7 of law, to the extent that it was not “objectively unreasonable,” shields Facebook’s damages. Mot. at  
8 14-15. As a general rule, however, “ignorance of the law will not excuse any person either  
9 criminally or civilly.” *Jerman v. Carlisle McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573,  
10 583 (2010) (recognizing that intentional conduct can be subject to liability despite a mistaken belief  
11 that such conduct is justified under the law). Even where a statute specifically provides for a good  
12 faith defense, and BIPA does not, ignorance is no excuse. *Id.* at 601-05 (bona fide error defense  
13 does not extend to attorney misinterpretation of the scope of the statutory provisions).

14           Facebook relies on a court decision from 1895 to attempt to redefine “negligence” as  
15 “objectively unreasonable conduct.” *See* Mot. at 14 (relying on *St. Louis, A. & T. H. R. Co v. Odum*,  
16 156 Ill. 78, 82 (1895)). The black letter definition of negligence is well known. It is the “failure to  
17 do something which a reasonably careful person would do, or the doing of something which a  
18 reasonably careful person would not [do], under circumstances similar to those shown by the  
19 evidence.” *See* Illinois Pattern Jury Instructions (“IPI”) §10.01. Meaning that, as of the enactment  
20 of BIPA in 2008, it was Facebook’s duty to use ordinary care – the care a reasonably careful person  
21 would use under circumstances similar to those shown by the evidence. *See* IPI §10.04.

22           Facebook’s obfuscation of the definition of negligence is transparently designed to create a  
23 defense where none exists. What Facebook is actually doing is asking the Court to rewrite BIPA to  
24 require a showing of willfulness rather than negligence like the statute says. “Willful[ness]” is a  
25 term “often understood in the civil context to excuse mistakes of law.” *See Carlisle*, 559 U.S. at  
26 1613 (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-26 (1985)). The problem for  
27 Facebook is that BIPA does not use the word “willful” at all. 740 ILCS 14/20. Accordingly,  
28 Facebook’s reliance on *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) is materially misplaced.

1 There, the Supreme Court interpreted the Fair Credit Reporting Act (“FCRA”) to determine, whether  
2 defendant’s violation of the FCRA rose to the level of **willfulness**, as that term is used in FCRA, and  
3 the Court equated willfulness to **recklessness** – not negligence. The court in *Safeco* found that  
4 notwithstanding Safeco’s violation of the statute, its reading of the statute was not objectively  
5 unreasonable and Safeco was thus “**not reckless** in falling down in its duty.” *Safeco*, 551 U.S. at 68;  
6 *Pintos v. Pac. Creditors Ass’n*, 2011 WL 3880411, at \*3 (N.D. Cal. Sept. 2, 2011) (*Safeco* . . .  
7 “determined what constitutes a willful violation of FCRA . . . . *Safeco* did not substantively address  
8 negligence . . . .”). Facebook’s reliance on *Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 377  
9 (3d Cir. 2012) is similarly misplaced as it did not evaluate negligence at all in determining liability  
10 for defendant’s mistaken interpretation of the Fair and Accurate Credit Transactions Act  
11 (“FACTA”). There, after concluding that Tommy Hilfiger had violated the FACTA, the court  
12 determined that Tommy Hilfiger’s violation was not “objectively unreasonable,” and thus not  
13 “willful” or “reckless,” because Tommy Hilfiger’s interpretation of FACTA had some foundation in  
14 statute. *Id.* The court in *Nicaj v. Shoe Carnival, Inc.*, 2014 U.S. Dist. Lexis 5453 (N.D. Ill. Jan. 16,  
15 2014) *aff’d sub nom. Redman v. Radioshack Corp.*, 768 F.3d 622 (7th Cir. 2014), made clear that  
16 both *Safeco* and *Long* analyzed the meaning and scope of “willful” violations, **not “negligence,”** and  
17 each concluded that those defendants’ erroneous interpretation of the FACTA was not “willful”  
18 unless it was “objectively unreasonable.” *Id.* at \*8-\*9.

19 Even if mistake of law is a viable defense, and it’s not, the evidence here demonstrates that  
20 any such mistake was “objectively unreasonable.” An intentional act can subsume negligent or even  
21 willful violation where evidence shows that a defendant **knew or should have known** that conduct  
22 was impermissible. Even a “careless reading of the statute . . . may support liability for a negligent  
23 violation.” *Pintos*, 2011 WL 3880411, at \*4. Here, Facebook concedes that it actually knew of  
24 BIPA’s prohibitions and requirements. In 2012, Facebook was directly confronted by the Senate  
25 Judiciary Committee specifically on its compliance with BIPA’s informed consent requirements that  
26 must be met before it could legally collect biometric data. Ex. 12 at 27; Ex. 38. During that hearing,  
27 Facebook was asked how one could be expected to provide informed consent under the statute, much  
28

1 less informed consent, when the Data Policy does not mention the collection of biometric data or  
2 facial recognition. *Id.* at 27; Ex. 17.

3 Facebook admits that there is no legal authority supporting its “misinterpretation” of the  
4 scope of BIPA. Mot. at 17.<sup>16</sup> But Facebook could have sought the appellate guidance it claims is  
5 lacking through Fed. R. Civ. P. 1292(b), after rulings in this case and others, but obviously elected  
6 not to. Mot. at 17. There is also no evidence that Facebook has attempted at any time since those  
7 rulings to receive prior written consent required by BIPA before collecting such biometric data. And  
8 apparently satisfied with the Courts’ *MTD Order*, Facebook waited nearly *two years* to request  
9 reconsideration. In the interim, however, it renewed its motion to dismiss on Article III grounds  
10 arguing that its conduct did not cause actual harm, and filed its motion for summary judgment on  
11 extraterritoriality grounds arguing that that because of the purported location of its servers, the  
12 violation did not happen in Illinois.<sup>17</sup> ECF Nos. 129, 257.

13 Facebook’s submission of 2012 correspondence with Australian authorities which further  
14 confirms its knowledge of BIPA and specifically quotes the statute. Mot. at 18; Sherman Decl., Ex.  
15 12. Moreover, the document says nothing about excluding photographs from the definition  
16 “biometric identifiers,” or anything about its flawed interpretation of BIPA. *Id.* What is clear is in  
17 that correspondence, Facebook materially mischaracterized BIPA claiming that the Illinois

18 [REDACTED]  
19 [REDACTED] Mot. at 18 (citing Sherman Decl., Ex. 12 at FBBIPA\_00040772) (emphasis in  
20 original). [REDACTED]

21 [REDACTED] Sherman Decl., Ex. 12  
22 n.18. At bottom, Facebook’s mistake of law defense appears to be yet another afterthought which

23 <sup>16</sup> Despite rulings in *Rivera v. Google, Inc.*, 238 F. Supp. 3d 1088, 1095 (N.D. Ill. 2017), *Monroy v.*  
24 *Shutterfly, Inc.*, 2017 U.S. Dist. LEXIS 149604 (N.D. Ill. Sept. 15, 2017), and this case that  
25 “biometric identifiers” include information extracted from photographs from BIPA’s definition,  
Facebook has continued to scan all photos for face geometry.

26 <sup>17</sup> The merits of each of Facebook’s summary judgment arguments are questionable. [REDACTED]  
27 [REDACTED] Ex. 18 at  
28 12.

Facebook didn't even deem important enough to plead in its answer or its Amended Answer to the Complaint or raise prior to summary judgment. It lacks any legal merit or evidentiary support and should be rejected.

**3. Plaintiffs Are Entitled to Recover for Each Violation and Need Not Prove Actual Damages**

The plain language of BIPA states that a "prevailing party may recover for *each* violation," liquidated damages of \$1,000 *or* actual damages, whichever is greater. 740 ILCS 14/20. If a plaintiff prevails against a defendant and proves more than one violation, the statute allows recovery for each violation not just one violation. *Id.*<sup>18</sup>

Facebook's assertion that plaintiffs must prove actual damages before they can recover liquidated damages also fails. Mot. at 24. BIPA does not suggest that one must prove actual damages at all, but clearly allows one to *choose* between actual damages and liquidated damages, whichever is greater. *See Vista Mktg., LLC. v Burkett*, 812 F.3d 954, 967-69 (11th Cir. 2016) (explaining the significance of statutory provision allowing a party to elect actual damages *or* statutory damages and noting that the election of statutory damages where provided for in the statute does not require proof of actual damages); *Schaffer v. Litton Loan Servicing LP*, 2008 U.S. Dist. LEXIS 124461 (C.D. Cal. July 31, 2008) (Holding that in a class action, plaintiff need not prove actual damages in order to recover statutory damages (citing *McDonald v. Washington Mut. Bank. F.A.*, 2000 U.S. Dist. LEXIS 11496 (N.D. Ill. June 26, 2000))).

*Doe v. Chao*, 540 U.S. 614, 619, 621 (2004), upon which Facebook relies, is inapposite and makes no mention at all of liquidated damages. Instead, the Supreme Court, interpreting the remedies under the Privacy Act of 1974, found that because the statute required to prove a statutory violation *and* resulting adverse consequences before triggering the damages provision, the plaintiff was required to first prove actual damages before being entitled to the statutory minimum. *Sterk v.*

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<sup>18</sup> Ignoring BIPA's plain statutory language, Facebook argues that plaintiffs should be limited to damages of one violation per person is without merit and contrary to the statutes' plain language. Their reliance on *Botts v. Kompany.com*, 2013 WL 12131257 (C.D. Cal. Jan. 14, 2013) and *Aliano v. Joe Caputo & Sons-Algonquin, Inc.*, 2011 WL 1706061 (N.D. Ill. May 5, 2011) is misplaced as each analyze statutes (FACTA and Copyright Act of 1976) that do not provide for damage for each violation. Mot. at 25. Facebook's improper request should be rejected.

1 *Redbox Automated Retail, LLC*, 672 F.3d 535, 537 (7th Cir. 2012) actually undermines Facebook’s  
2 argument as it holds that even where a statute states that a person aggrieved of a violation may  
3 recover “actual damages but not less than liquidated damages in the amount of \$2500,” that such  
4 language plainly allowed for the recovery of liquidated damages without the need to prove actual  
5 damages. *Id.* Under BIPA however, the violation is the injury. Renewed MTD Order at 6-7  
6 (violation of BIPA notice and consent procedures constitute concrete injury). And, because actual  
7 damages might be difficult to estimate, the statute provides for disjunctive relief; either liquidated  
8 damages of a minimum of \$1000 per violation *or* actual damages, whichever is greater. Aggregation  
9 of damages on a class-wide basis is plainly authorized by the statute as there is no prohibition against  
10 class actions in BIPA. Class Cert. Order at 15 (“[T]he Illinois legislature knows how to speak  
11 clearly when it wants to foreclose class actions.”).

12 **E. Facebook Has Collected, Obtained and Stored Plaintiffs’ and Others’**  
13 **Biometric Identifiers**

14 Only by ignoring its own contemporaneous documents, manufacturing agreement between  
15 competing experts, imposing an unnaturally narrow definition of “scan of face geometry” and  
16 conveniently characterizing its facial recognition technology in a way that avoids its interpretation of  
17 BIPA, is Facebook able to portray the merits of plaintiffs’ action as beyond reasonable dispute.  
18 Further, Facebook does not even bother to address its pre-2014 facial recognition technology, instead  
19 exclusively focusing on the post-2014 version of its system that uses a deep neural network  
20 (“DNN”). When BIPA is properly construed and the record is properly considered, there is no doubt  
21 that Facebook’s Motion must be denied.

22 **1. Plaintiffs Were Subject to Facebook’s Facial Recognition**  
23 **Technology**

24 Contrary to its own records, Facebook contends that there is “no evidence” that any photos of  
25 plaintiffs were subject to the Company’s facial recognition system. Mot. at 19. This is patently  
26 absurd. For example, Facebook’s own record of plaintiff Patel’s “Facial Recognition Data” states  
27 that Facebook has *165 examples* of his face (all of which were scanned for facial geometry) and  
28

provides the three thresholds that it's facial recognition system uses to identify a user and provide a corresponding tag suggestion:<sup>19</sup>

## Nimesh Patel

### Facial Recognition Data

Threshold 1 3.3230273723602

Threshold 2 3.1131439208984

Threshold 3 1.6582270860672

Example Count 165

Ex. 20; [REDACTED]

[REDACTED]

Ex. 19 at 7. Thus, Facebook has applied its facial recognition system to the hundreds of photos that it admits plaintiffs have uploaded, and to the photos of plaintiffs in which they have been tagged.

<sup>19</sup> This information is in Facebook's possession for every person for whom Facebook has scanned face geometry and stored a face template. [REDACTED]

1 There is no genuine dispute that Facebook has in fact applied its facial recognition system to  
2 plaintiffs' faces.

3 **2. Facebook Undisputedly Collects, Obtains and Stores Scans of**  
4 **Face Geometry**

5 According to the Company, any one of its nearly two billion users can be identified from a  
6 photo of his or her face with [REDACTED]

7 [REDACTED]  
8 [REDACTED] [REDACTED]  
9 [REDACTED] This, of course, defies common sense and is a blatant attempt to skirt BIPA's clear language and  
10 intent. The reality is that Facebook collects, obtains and stores scans of face geometry through the  
11 alignment, representation and classification phases of its pre- and post-2014 facial recognition  
12 systems.

13 Facebook contends that a "scan of face geometry" is limited to an "express representation  
14 of measurements of depths, distances, or angles among human-notable facial features used to  
15 identify a person." Mot. at 20. But BIPA provides no such limitation. Facebook offers no authority  
16 for its claim that "scan of" means "express representation," likely because there is none. Scan,  
17 which is both a noun and verb, includes any act of close examination, not merely a reproduction or  
18 representation. *Webster's New College Dictionary* 1008 (3d ed. 2008); Ex. 30, ¶¶11-12. And even  
19 according to Facebook's source, "geometry" includes "surface shape," the "relative arrangement of  
20 parts or elements[] such as shape" and "an arrangement of objects or parts that suggest geometric  
21 figures." *Webster's New College Dictionary* 242, 478 (3d ed. 2008); Ex. 30, ¶¶13-14. [REDACTED]

22 [REDACTED]  
23 [REDACTED]  
24 <sup>20</sup> [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]



1 Accordingly, any act of close examination of a face’s surface shape or the relative arrangement of  
2 facial parts or shape is a “scan of face geometry.”

3 To the extent Facebook contends a scan of face geometry only exists when an identification  
4 is made, it is incorrect. *See* Mot. at 20, 23-24. The definition of a “biometric identifier,” which  
5 includes a “scan . . . of face geometry,” does not include any requirement that the biometric identifier  
6 actually be “used to identify an individual.” 740 ILCS 14/10. That limitation appears only under the  
7 definition of “biometric information,” an entirely separate issue under BIPA. *Id.* BIPA’s purpose  
8 would hardly be served if private entities could freely collect biometric identifiers without notice and  
9 consent so long as they did not use that data to actually identify an individual. 740 ILCS 14/5  
10 (biometrics are “unique” and “once compromised” cannot be changed).

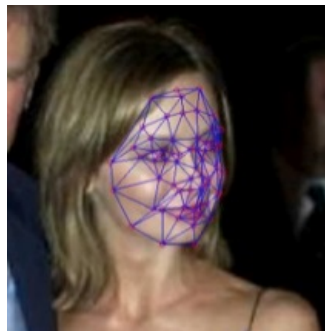
11 **a. Facebook Admittedly Scans Users’ Face Geometry as**  
12 **Early as the Detection Tier of Its Facial Recognition**  
**Processing**

13 Here, the parties are in agreement about the facts; during detection and alignment, [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]



22 [REDACTED]. Facebook,  
23 however, asserts that the detailed map of fiducial points is not a scan of face geometry because it is  
24 not used to represent or distinguish an individual’s face geometry and is not relied on to produce a  
25 face signature or template. Mot. at 23. Neither is true.

26 Facebook merely parrots its expert to conclude that the fiducial point map is not a scan of  
27 face geometry. Mot. at 23. [REDACTED]  
28

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED] In other words, a scan of face  
7 geometry. *See* Ex. 30, ¶29.

8 Facebook is also wrong that it does not use information from fiducial points to create face  
9 signatures or templates. Mot. at 23. [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21 [REDACTED] The evidence is clear – Facebook obtains scans of face geometry at the detection tier and  
22 uses the information obtained to drive the subsequent recognition.

23 \_\_\_\_\_  
24 <sup>21</sup> Research article titled “DeepFace: Closing the Gap to Human-Level Performance in Face  
Verification” (“DeepFace paper”).

25 <sup>22</sup> [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

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<sup>23</sup> Plaintiffs' position on face signatures is entirely consistent with the complaint allegations and, at most, is a "factual predicate tending to support the *same legal theory* of defendants' liability." *Javansalehi v. BF & Assocs.*, 2011 U.S. Dist. LEXIS 126370, at \*17 (D. Or. Nov. 1, 2011) (refusing to apply *Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000) where, as here, theory of liability did not change from complaint). Facebook is well aware of plaintiffs' position.

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED] Accordingly, the evidence clearly demonstrates  
7 that, at a minimum, Facebook cannot show the absence of a genuine issue of fact and is not entitled  
8 to judgment on the basis that face signatures are not scans of face geometry.

9 Facebook explanation for why a holistic face recognition system does not involve a scan of  
10 face geometry under BIPA – *i.e.*, the legislature was only concerned with systems that could be used  
11 to steal a person’s identity – is also meritless. Mot. at 21 n.19. The legislature made no such  
12 distinction and explicitly stated that the law was needed because biometrics, whether from a holistic  
13 system or otherwise, “are biologically unique . . . [and] once compromised, the individual has no  
14 recourse.” 740 ILCS 14/5(c). Further, Facebook has no basis to conclude that its system cannot be  
15 breached. [REDACTED]

16 [REDACTED]  
17 [REDACTED] <sup>24</sup> Accordingly, summary judgment is unwarranted.

18 Despite Facebook’s nonsensical claim, the evidence demonstrates that face templates are  
19 scans of face geometry and thus biometric identifiers. See [REDACTED]

20 [REDACTED]  
21 [REDACTED]. Facebook contends that face templates (also known as face models or  
22 hyperplanes) are not scans of face geometry or biometric data because the face signatures from  
23 which they are derived do not involve face geometry. Mot. at 21. As explained above, face  
24 signatures are scans of face geometry. Thus, face templates, [REDACTED]

25 <sup>24</sup> Facebook’s arguments incorporated by reference from a motion in the since-dismissed *Gullen*  
26 matter (Mot. at 22-23) should be stricken as they violate the page limit and prejudice plaintiffs. And,  
27 contrary to its baseless contention, [REDACTED]

28 [REDACTED] *Ehrler v. Berryhill*, 2017 U.S. Dist.  
LEXIS 70860, at \*22 (E.D. Wash. May 9, 2017).

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[REDACTED]

In sum, Facebook is not entitled to summary judgment based on its arguments that no part of its facial recognition system collects, obtains or stores scans of face geometry.

**III. CONCLUSION**

For the reasons stated above, the Court should deny Facebook’s motion for summary judgment.

DATED: April 16, 2018

Respectfully submitted,  
  
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2 I hereby certify that on April 16, 2018, I authorized the electronic filing of the foregoing with  
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4 e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I  
5 caused to be mailed the foregoing document or paper via the United States Postal Service to the non-  
6 CM/ECF participants indicated on the attached Manual Notice List.

7 I certify under penalty of perjury under the laws of the United States of America that the  
8 foregoing is true and correct. Executed on April 16, 2018.

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